

Defending “Lack of Consent” Rape Cases

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INTRODUCTION

- What is a “consent” rape case?
 - Sociology of “consent” rape.
 - Three fact scenarios
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Three cases to study

- 1) State v. Robert Mount
 - 2) State v. Burckhard
 - 3) State v. Peter D.
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PART I

Elements of the Crime:
Critical Elements Instruction

'Without Consent' means:" (45-5-503)

- ☐ A victim is compelled to submit by force
 - ☐ Victim is incapable of consenting because of:
 - Mental defect or incapacitation
 - Physical helplessness
 - Overcome by deception, coercion, or surprise
 - Under age 16 (but see proposed 2009 legislation)
 - Incarcerated or in a treatment facility or on probation or parole and perpetrator is employee, contractor, or volunteer of supervising authority and has supervisory or disciplinary control over victim
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45-5-503, MCA: SIWOC

- ☐ A person who knowingly has s.i.w.o.c. with another person commits the offense of SIWOC. A person may not be convicted under this section based on the age of that person's spouse.
 - ☐ A person convicted of SIWOC shall be punished by life imprisonment or by imprisonment for a term of not less than 2 years or more than 100 years and fined not more than \$50,000.
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45-5-502. MCA: Sexual Assault

- ☐ A person who knowingly subjects another person to any sexual contact without consent commits the offense of sexual assault.
 - ☐ A person convicted of sexual assault shall be fined not to exceed \$500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.
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45-2-103, MCA. Criminal act and mental state

- [Except for del. hom and absolute liability offenses] . . . A person is not guilty of an offense unless, with respect to each element described by the statute defining the offense, a person acts while having one of the mental states of knowingly, negligently, or purposely.
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45-2-103, MCA. Criminal act and mental state (continued)

- The existence of a mental state may be inferred from the acts of the accused and the facts and circumstances connected with the offense.
 - If the statute defining an offense prescribes a particular mental state with respect to the offense as a whole **without distinguishing among the elements of the offense**, the prescribed mental state applies to each element. [emphasis added]
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45-2-103, MCA. Criminal act and mental state (continued)

- Knowledge that certain conduct constitutes an offense or knowledge of the existence, meaning, or application of the statute defining an offense is not an element of the offense unless the statute clearly defines it as an element.
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45-2-101(36), MCA. "Knowingly"

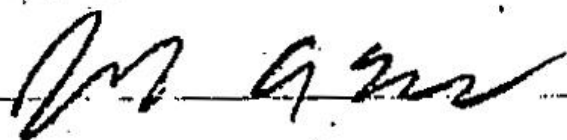
- A person acts knowingly with respect to conduct or to a circumstance described by that conduct when the person is aware of the person's own conduct or that the circumstance exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when the person is aware that it is highly probable that the result will be caused by the person's conduct. When knowledge of the existence of a particular fact is an element of an offense, knowledge is established if a person is aware of a high probability of its existence.
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Comment from a Montana prosecutor in her closing summation at trial

“And it’s important to note that he doesn’t have to know that what he’s doing constitutes sexual intercourse without consent. He just has to know what he’s doing.”

We request an explanation
or interpretation of
"Knowingly" as an issue
in criminal charges.

Does a person have to know
it is a crime, or is it
simply being aware of your
actions?



Foreman John Kearns

Judge's answer to the jury's question

"No. A person does not have to know his behavior is a crime, but neither is it enough for a person simply to be aware of his actions. When the charge is sexual intercourse without consent, he must also know that what he did was without consent."

The Pattern Instruction (MCrJI 5-503(a))



To convict the Defendant of SIWOC, the State must prove the following elements:

1. The defendant had sexual intercourse with [victim] ; and
2. The act of sexual intercourse was without the consent of [victim]; and
3. The defendant acted knowingly.

A Modified Instruction

(MCrJI 5-503(a) with subsection
(3) revised to conform to statute)



To convict the Defendant of SIWOC, the State must prove the following elements:

1. The defendant had sexual intercourse with [victim] ; and
2. The act of sexual intercourse was without the [victim's] consent; and
3. The defendant acted knowingly, that is, he both (a) knew he was having sexual intercourse with [victim]; and (b) knew that she did not consent to such intercourse.

Authority for the Modified Instruction



“Sections 45-2-103(1) and 45-2-103(4), MCA, make clear that the **mental state** prescribed with respect to the offense as a whole **applies to each element of the offense** (in this case, the elements of ‘sexual intercourse ’ and ‘without consent.’)”

PART II

Evidence about the Relationship:

(a) Res Gestae

(b) Rape Shield Statute

26-1-103, MCA. Declaration, act, or omission which is a part of the transaction

- Where the declaration, act, or omission forms part of a transaction which is itself the fact in dispute or evidence of that fact, such declaration, act, or omission is evidence as part of the transaction.
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45-5-511, MCA. Provisions generally applicable to sexual crimes

- ❑ When criminality depends on the victim being less than 16 years old, it is a defense for the offender to prove that he reasonably believed the child to be above that age. Such belief shall not be deemed to be reasonable if the child is less than 14 years old.
 - ❑ No evidence concerning the sexual conduct of the victim is admissible in prosecutions under this part except evidence of the victim's past sexual conduct with the offender or evidence of specific instances of the victim's sexual activity to show the origin of semen, pregnancy, or disease which is at issue in the prosecution.
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45-5-511, MCA. Provisions generally applicable to sexual crimes (cont'd)

- ❑ If the defendant proposes for any purpose to offer evidence described in subsection (2) the trial judge shall order a hearing out of the presence of the jury to determine whether the proposed evidence is admissible under subsection (2).
 - ❑ Evidence of failure to make a timely complaint or immediate outcry does not raise any presumption as to the credibility of the victim.
 - ❑ Resistance by the victim is not required to show lack of consent. Fear, force, or threat is sufficient alone to show lack of consent.
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PART III

The Defendant Must Testify !
(Can he?)

PART IV

Investigation, Mediation, Etc.
